92-1445

No. ___-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,
Plaintiff,

and

LUMMI INDIAN TRIBE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OFFICE OF THE
RESERVATION
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February 25, 1993

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Petitioner, Lummi Indian Tribe prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered December 3, 1992, which affirmed the judgment of the U.S. District Court for the Western District of Washington at Seattle.

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in failing to consider the historical context and the clear Indian intent and understanding of a Treaty promise when interpreting the Treaty of Point Elliott and the Executive Order implementing that Treaty as it relates to the boundaries of the Lummi Indian Reservation.

TABLE OF CONTENTS

Page

Reference to the Reports of Opinions Below 1

Statement of Jurisdiction 2

Treaties and Executive Orders Involved 2

Statement of the Case 4

Argument 6

Appendices:

Appendix A: Decision and Order Re Eastern Boundary of Lummi Indian Reservation, United States District Court Western District of Washington at Seattle..... A-1

Appendix B: Opinion, United States Court of Appeals for the Ninth Circuit..... B-1

Appendix C: Order, United States Court of Appeals For The Ninth Circuit..... C-1

Appendix D: Reservation Map..... D-1

TABLE OF AUTHORITIES

Cases *Page*

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 7, 11-14

Bartlett Land and Lumber Company v. Saunders, 103 U.S. 316 (1881) 7

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 7

Jones v. Meehan, 175 U.S. 1 (1899) 7, 8, 10

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 15

Shively v. Bowlby, 152 U.S. 1 (1894) 13

The Kansas Indians, 5 Wall. 737 (1867) 7

United States v. Lummi Indian Tribe, 841 F.2d 317 (9th Cir. 1988) 8

United States v. Romaine, 255 F. 253 (9th Cir. 1919) 5, 6, 8

United States v. State of Washington, 969 F.2d 752 (9th Cir. 1992) 1, 6-9, 11

United States v. Washington, 384 F.Supp. 312 (W. D. Wash. 1974) 4, 14

TABLE OF AUTHORITIES, *(continued)*

Page

United States v. Washington,
774 F.2d 1470 (9th Cir. 1985) 4

United States v. Washington,
Civil Number 9213 4

Washington v. Washington Commercial Passenger Fishing Vessel Association,
443 U.S. 658 (1979) 4, 7, 11, 14

Worcester v. Georgia, 6 Pet. 515 (1832) 7

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. §1345 and 1331 4

Act of March 3, 1891, c. 561,
26 *Stat.* 1101 §15 12

Article 2, Treaty of Point Elliott,
12 *Stat.* 927 (1859) 2, 7

Northwest Ordinance of 1787, 1 *Stat.* 51 9

Oregon Territory by §14, Act of 1848,
9 *Stat.* 323 9

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REFERENCE TO THE REPORTS OF OPINIONS BELOW

United States v. State of Washington, 969 F.2d 752 (9th Cir. 1992).

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals, Ninth Circuit, entered on December 3, 1992, which issued on a Petition for Re-Hearing of the judgment entered on June 30, 1992. The statutory provision conferring jurisdiction is 28 U.S.C. § 1254(1).

TREATIES AND EXECUTIVE ORDERS INVOLVED

This case involves the interpretation of Article II of the Treaty of Point Elliott (Muckl-te-oh) dated January 22, 1855, 12 *Stat.* 927 (1859) which reads:

> There is, however, reserved for the present use and occupation of said tribes and bands the following tracts of land, *viz*: the amount of two sections, or twelve hundred eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-Sohk-Um; the amount of two sections or twelve hundred eighty acres, on the north side of Hwhomish Bay and the creek emptying into the same called Kwilt-Seh-Da, the peninsula at the southeastern end of Perry's Island, called Shais-Quihl, and the Island called Chah-Choo-Sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the straight of Georgia. All which tracts which shall be set apart, and so far is necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to be reside upon the same without the permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for a

public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

Also involved is an Executive Order of November 22, 1873 which reads:

Executive Mansion, November 22 1873.

It is hereby ordered that the following tract of country in Washington territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, *viz.*:

Commencing at the eastern mouth of the Lummi river thence up said river to the point where it is intersected by the line between section seven and eight of township thirty-eight north range two east of the Willamette meridian thence due north on said section line to the township line between townships thirty-eight and thirty-nine thence west along said township line to the low-water mark on the shore of the Gulf of Georgia thence southerly and easterly along said shore with the meanders thereof across the western mouth of the Lummi river and around Point Francis thence northeasterly to the point of beginning - so much thereof as lies south of the west Fork of the Lummi river being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians made and concluded January 22, 1857 [*sic*] [Stats at. Large Vol. 12. p. 928]

U.S. Grant.

Federal jurisdiction in the District Court was founded upon 28 U.S.C. §1345 and 1331.

STATEMENT OF THE CASE

This case involves a determination of the eastern boundary of the portion of the Lummi Indian Reservation which adjoins Bellingham Bay in Washington State (see Appendix D). The issue arises as part of the continuing jurisdiction of the U.S. District Court for the Western District of Washington at Seattle in *United States v. Washington,* Civil Number 9213, the northwest Treaty fishing rights litigation. The basic rulings in the case are found in *United States v. Washington,* 384 F.Supp. 312 (W. D. Wash. 1974) affirmed 520 F.2d 676 (9th Cir. 1975), *cert.* denied 423 U.S. 1086 (1976), affirmed *sub. nom. Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979). Those decisions established the rights of certain pacific northwest Indian Tribes to an equal sharing with non-Treaty fishers of the salmon fishery in Puget Sound.

Following those decisions in 1985, the Ninth Circuit Court of Appeals ordered the District Court to adjust the catch allocations between Treaty and non-Treaty fishers so as to roughly equalize the harvests. *United States v. Washington,* 774 F.2d 1470 (9th Cir. 1985). The State of Washington then initiated this sub-proceeding, contending that the non-Treaty fleet was deprived of an opportunity to harvest salmon in a portion of Bellingham Bay due to a dispute over the proper location of the eastern boundary of the Lummi Indian Reservation.

The State contends that the boundary follows the meandering low-water mark between Point Francis and Treaty Rock which earlier litigation had established as the point of beginning of the legal description contained in the 1873 Executive Order defining the Reservation boundaries. *United States v. Romaine,* 255 F. 253 (9th Cir. 1919). The Lummi Tribe contends that the eastern boundary follows a straight line between Point Francis and Treaty Rock. The Tribal position is based upon the negotiations between the Tribe and the United States at the time of the Treaty in 1855, and upon the wording of the 1873 Executive Order which contains a legal description of the Reservation boundaries. The western boundary of the Reservation is described as following the low-water mark, but the eastern boundary runs from Point Francis "thence northeasterly to the point of beginning" without any indication that it is to follow the meandering low water mark. The differences in the two positions are illustrated in Appendix D, a reduced copy of a trial exhibit in the case. The District Court concluded that the Executive Order was ambiguous but resolved the ambiguity in favor of the State. The Tribe appealed. The Court of Appeals acknowledged there was substantial evidence of the actual Indian understanding of both the Treaty and the Executive Order, including sworn testimony from prior litigation which involves an eye witness account of the Treaty negotiations. The Court of Appeals, however, did not consider this evidence because it ruled that the Treaty and Executive Order unambiguously required the meandering low-water boundary. In reaching its conclusions, the Court acknowledged that:

> The rule has long been that 'treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful

> expressions in them should be resolved in the Indians' favor. We have stated that the rule applies to Executive Orders no less than treaties. 969 F.2d 752 at 755 (citations omitted).

Nonetheless, the Court refused to apply the rule which it had acknowledged because it concluded the Executive Order was not ambiguous.

The Lummi Tribe moved for re-hearing of the Court of Appeals' decision, but re-hearing was denied. The Tribe now seeks review in this Court on the grounds that the opinion of the Court of Appeals is contrary to the overwhelming weight of Supreme Court precedent which controls the construction and interpretation of Indian Treaties and Executive Orders.

ARGUMENT

For the past 138 years, the Lummi people have treated the eastern boundary of their Reservation on Bellingham Bay in Washington State as a straight line between Point Francis and Treaty Rock. Their understanding of their Reservation is founded on the promises and representations made to them in 1854 by Washington Territorial Governor Issac Stevens when he was negotiating the Treaty of Point Elliott with them. While standing at Treaty Rock, Governor Stevens gestured to Point Francis and specifically told the Lummi people that their Reservation would encompass all of the area west of "a line running from Point Francis to Treaty Rock." *United States v. Romaine*, 255 F. 253, 259 (9th Cir. 1919). When the government reduced this promise to writing in the Treaty, however, the Reservation was only generally described as comprising "the island called Chah-Choo-Sen," without making mention of the precise

boundaries. Article 2, Treaty of Point Elliott, 12 *Stat.* 927 (1859).

The Court of Appeals ruled this Treaty provision unambiguously reserved to the Lummi only the "island" itself, strictly construed, not including any submerged lands or water areas. *United States v. Washington,* 969 F.2d 752 (9th Cir. 1992). The legal description of the Reservation contained in the 1873 Executive Order implementing the Treaty was likewise deemed unambiguous by the Court of Appeals, despite a final surveyor's call in the description which directs a line from Point Francis "thence northeasterly to the place of beginning." The legal principles which control surveys would ordinarily require this call to be a straight line. See, e.g. *Bartlett Land and Lumber Company v. Saunders,* 103 U.S. 316 (1881).

The Court of Appeals decision disregards over 150 years of consistent rulings by this Court governing the construction and interpretation of Indian treaties and related documents. *Worcester v. Georgia,* 6 Pet. 515 (1832); *The Kansas Indians,* 5 Wall. 737 (1867); *Jones v. Meehan,* 175 U.S. 1 (1899); *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970); *Washington v. Washington Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 675-76 (1979). It further conflicts with this Court's interpretation of the word "islands" in an earlier, although less compelling, case involving an Indian Reservation. *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918). The Court should grant certiorari to correct this error and to restore to the Lummi people the Reservation which was promised them in 1855.

If the descriptions of the Lummi Indian Reservation and the Treaty and Executive Order are susceptible to two differing reasonable interpretations, they are ambiguous, and the Lummi are entitled to the interpretation which most closely reflects their understanding of the transaction. *Jones v. Meehan, supra.* It is abundantly clear from eye witness testimony that the Lummi were promised and understood the eastern boundary of their Reservation to be a straight line between Point Francis and Treaty Rock. For example, in an earlier proceeding, *United States v. Romaine,* 255 F. 253 (9th Cir. 1919), several Lummi Indians testified regarding the Treaty negotiations. The most significant witness was George Tsilano who was 38 years old at the time of the 1855 Treaty. He testified that he was present at the Treaty negotiations, and that he and other Lummi representatives understood that the eastern boundary of the Reservation was to run on a straight line between Point Francis and Treaty Rock: *Romaine, supra,* 255 F. at 256.

The *Romaine* testimony was admitted in the trial of the present action, along with an exhibit from that case which illustrated the straight line boundary. Thus, unlike many Indian cases where the Indian understanding must be extrapolated from an "extremely fragmentary" record, *United States v. Lummi Indian Tribe,* 841 F.2d 317, 318 (9th Cir. 1988), here the Court has the benefit of direct eye witness testimony. Tsilano's testimony was noted by the Court of Appeals, but given no weight whatsoever, let alone controlling weight. 969 F.2d at 756.

The Court of Appeals acknowledged that it was required to "interpret the Executive Order and its phrase 'around Point Francis thence northeasterly to the point

of beginning.'" 969 F.2d 754 n.2. It further acknowledged that the Treaty must be interpreted as the Indians would have understood it. 969 F.2d at 755. However, the Court then avoided applying that principle by interpreting the legal description in the Executive Order in a manner which made it unambiguous. Therefore, the Court concluded, the Indian understanding of the Treaty and Executive Order was not relevant.

Basic principles of federal Indian law cannot be so lightly disregarded. The implications of the Court of Appeals decision are far reaching. The Indian people who treated with the United States were owed a duty of "utmost good faith" by the government which promised that their land would "never be taken from them without their consent." Northwest Ordinance of 1787, 1 *Stat.* 51, made applicable to the Oregon Territory by §14, Act of 1848, 9 *Stat.* 323. Yet if the government may induce the Indian people into signing an agreement by promising certain lands, and then deprive them of the lands by failing to properly and unambiguously incorporate those promises in the written record of the transaction, the Indians have been done a grave injustice. The inequity is compounded when the government controls not only the written record, but the translation of it into the Native language and the explanation of that translation to the "unlettered people" with whom it has negotiated.

It is for precisely those reasons that this Court developed the canons of construction applicable to Indian documents. Consistent with the Congressional injunction of the Northwest Ordinance of 1787, which pre-dates even the Constitution itself, and with this Court's own conscientious principles:

> [i]n construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the Treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are weak and dependent people who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.
> *Jones v. Meehan,* 175 U.S. 1, 10-11 (1899).

The Court of Appeals avoided all these principles by the simple expedient of declaring the Treaty and Executive Order unambiguous. Thus, the Court interpreted the documents outside of their historical context and without regard to the intention of the parties. By interpreting the document from a twentieth century perspective and considering only the text within the four corners of the document, the Court of Appeals has essentially reversed 150 years of Supreme Court precedent.

Certainly, the Treaty and Executive Order are susceptible to the interpretation given them by the Court of Appeals. However, they are also susceptible to another interpretation, one that is consistent with the Indian understanding. The Court of Appeals' analysis proceeds as though its task is to find an interpretation which will render the documents unambiguous so that the application of applying the principles of construction may be avoided. This is not the law. The task of the court is to determine whether the documents, viewed in light of their historical context and the intent of the parties, are susceptible to more than one reasonable interpretation. If they are, the Court is required to adopt the interpretation most favorable to the Indians. *Washington v. Washington Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 675-76 (1979). The Court of Appeals completely failed to undertake this analysis.

The justification given by the Court of Appeals focuses on the reference in the Executive Order to the "island already set apart by the second article of the Treaty." It then observes that "the Treaty says nothing about a straight line boundary from Point Francis to Treaty Rock." 969 F.2d 755.

In fact, the Treaty does not mention boundaries at all. Rather, it refers in general terms to "the Island called Chah-Choo-Sen." When this Court faced a similar island description in *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918), it did not limit its enquiry to the statute creating the Reservation. Rather, the Court observed:

> As an appreciation of the circumstances in which words are used usually is conducive and at

> times is essential to a right understanding of them, it is important, in approaching a solution to the questions stated, to have in mind the circumstances in which the reservation was created - - the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.
> 248 U.S. at 87.

Alaska Pacific Fisheries dealt with the Metlakahtla Indian Reservation which was created by Congress in 1891 for a band of Canadian Indians who had recently emigrated from British Columbia to Alaska. Unlike the situation with the Lummi Reservation, the lands set apart for the Metlakahtlans was not part of their aboriginal territory, and no treaty was involved. The Act of Congress provided simply that "the body of lands known as the Annette Islands . . . is hereby set apart as a reservation for the use of the Metlakahtla Indians . . ." Act of March 3, 1891, c. 561, 26 *Stat.* 1101 §15, cited in *Alaska Pacific Fisheries, supra,* 248 U.S. 78 at 86. It would have been a simple matter for the Court to conclude that only the upland portions of the islands were included, especially in light of the explicit Congressional reference to "*the body of lands* known as the Annette Islands." (Emphasis added)

The issue arose because a non-Indian fish company had erected a fish trap on submerged lands near one of the islands. The trap was clearly beyond the tidelands and located on bedlands.[1] The Court

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[1]Tidelands are the area between high water and extreme low water. Bedlands are lands underlying salt

described the trap as being "located in water of considerable depth." 248 U.S. at 87. Under the Court of Appeals analysis these submerged lands would not be part of the "island." If the fish trap were located outside the Reservation, then the Indians had no complaint about its location or operation. However, if it were located within the Reservation, it could be enjoined by the federal government since the Indians enjoyed an exclusive fishery on their Reservation.

As this Court phrased the issue:

> The principal question for decision is whether the Reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged lands. The question is one of construction - of determining what Congress intended by the words "the body of lands known as the Annette Islands."
> *Alaska Pacific Fisheries, supra,* 248 U.S. at 87.

The statute appears clear and nonambiguous on its face. This Court could easily have concluded that the term "island" included only fast land, or at most, uplands and tidelands, but not submerged lands. This conclusion would have been easily supported by the theory that pre-statehood grants of lands below navigable waters must be explicit since the federal government is presumed to hold such lands in trust for a future state during the territorial period. *Shively v. Bowlby,* 152 U.S. 1 (1894).

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water which are always submerged.

The Court did not take this approach, however. Instead, it examined the entire historical context of the statute, recounting the history of the Metlakahtla emigration to Alaska and the physical characteristics of the Annette Islands, as well as considering the purpose of creating the Reservation. That purpose was "to encourage, assist and protect the Indians in their efforts to train themselves to the habits of industry, to become self sustaining and advance to the ways of civilized life." 248 U.S. at 89. The Court placed special emphasis on the fact that the Metlakahtlans "were largely fishermen and hunters, accustomed to live from the returns of those vocations, [who] looked upon the Islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of substance and a promising opportunity for industrial and commercial development." 248 U.S. at 88.

Identical observations apply to the Lummi people. "Fishing is vitally important to the people of the [Lummi] Tribe, both for subsistence and livelihood." *United States v. Washington,* 384 F.Supp. 312 at 362 (W. D. Wash. 1974) affirmed *sub. nom. Washington v. Washington Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979). The aboriginal "Lummi Indians developed a highly efficient technique, known as reef netting, for taking large quantities of salmon in salt water . . .. When nature did not provide optimum reef conditions the Indians artificially created them." *Id,* 384 F.Supp. at 360. Like the Metlakahtlans, the Lummi fisheries were threatened by the construction of fish traps. *Id,* 384 F.Supp. at 361. Like the Metlakahtlans, the Lummis derived great benefit from an exclusive on-Reservation fishery. The right to exclude others, after all, is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

After consideration of all these factors the *Alaska Pacific Fisheries* court interpreted the statutory grant as including the submerged lands where the offending fishtrap was located. The court reached this conclusion without the benefit of any evidence of the actual Indian understanding of the statute involved. By contrast, here we have a negotiated Treaty and eye witness accounts of the negotiations which clearly demonstrate the Indian understanding and intent.

The Court of Appeals considered none of these factors in its strict interpretation of the Treaty and Executive Order. Nor did it consider the uncontroverted Indian understanding of the relevant documents or the negotiations that led to the execution of those documents. The Court should issue a Writ of Certiorari to review the decision of the Court of Appeals which fails to take into account controlling Supreme Court precedent.

Respectfully submitted this 25th day of February, 1993.

OFFICE OF THE
RESERVATION
ATTORNEY

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APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. 9213 - Phase I Subproceeding No. 86-7 DECISION AND ORDER RE EASTERN BOUNDARY OF LUMMI INDIAN RESERVATION

On August 26, 1987 the United States Magistrate issued his Report and Recommendation on Boundary of Lummi Indian Reservation wherein he recommended in pertinent part that the court find that the eastern boundary of the Lummi Indian Reservation be deemed to proceed along the low water mark around Portage Island and, following the meanderings of the shore, to a point due south of Treaty Rock; then due north to Treaty Rock.

The court has received and considered the objections to the Report and Recommendation filed by the Lummis and joined by the United States, the Hoh, Quileute, Nisqually, Squaxin, Nooksak, Saux-Suiattle,

Upper Skagit, Swinomish, Stillaguamish, Muckleshoot, Squaxin Island, Skokomish, Suquamish, Port Gamble Klallum, Jamestown Klallum, Lower Klallam, Quinault Nation, and Tulalip Tribes, as well as the separate briefs filed in support of their objections by the United States and the Tulalips and in opposition to these objections by the State of Washington. In reviewing and considering these objections, the court has been governed by the standards set forth in Rule 72(b), Federal Rules of Civil Procedure and 28 U.S.C.§636(b)(1)(B) and has conducted a de novo review where required to do so.

Upon due consideration of the record herein, the objections of the parties, and their respective briefs, the court issues the findings of fact and conclusions of law set forth herein. In so ruling, the court concurs in the Magistrate's ultimate conclusion, making certain modifications to the Report and Recommendation.

FINDINGS OF FACT

1. Issac Ingalls Stevens, Governor of Washington Territory, met with representatives of many Western Washington tribes, including the predecessors of the Lummis, in 1854 at "Point Elliot," or Mukilteo. They negotiated an agreement of the creation of a reservation for the Lummis.

2. The Treaty of Point Elliot ("the Treaty"), executed January 22, 1855, (Exh. F-137) memorialized that agreement. The Treaty described the area set aside for the Lummis as:

> "... the island called Chah-choo-sen, situated in the Lummi River at the point of separation at the mouths emptying

respectively into Bellingham Bay and the Gulf of Georgia." (Exh. F-137, p.2).

Exh. F-151 illustrates this 'island' most clearly. The description in the Treaty did not allude in any way to bedlands, under Bellingham Bay or elsewhere.

3. Members of the Lummi Tribe have testified at various times that it has been their understanding that the eastern boundary of the reservation is a line from Treaty Rock to Point Francis. In *United States v. Romaine,* 255 Fed. 253 (1919), one tribal member testified he had participated in negotiation of the treaty with Governor Stevens' and, "that it was always understood that . . . the eastern boundary line would be from Point Francis to Treaty Rock." (Exh. L-13, p.37). Other tribal members testified in *Romaine* that they had been told by persons present during the negotiations that this was to be the boundary. All conversations between the Lummis and Governor Stevens were translated in two phases: from English into Chinook jargon, and then into the Lummi language. Samuel Cagey, a tribal member, testified in this sub-proceeding that he had been told that Governor Stevens motioned with his arms that the line would run from Treaty Rock to Point Francis.

4. A map prepared by the Surveyor General in 1859 (Exh. F-152) depicts all Indian reservations in the area. It includes no portion of Bellingham Bay within the Lummi Reservation.

5. Indian Agent M.T. Simmons proposed certain changes in the northern boundaries of the reservation in a letter dated December 13, 1859 (Exh.F-

138).[1] The purpose of the proposed changes was to avoid the expense of a survey. The changes proposed by Simmons are clearly illustrated on Exh. F-154. The boundary description proposed by Simmons, insofar as it related to the shorelines of the reservation, began on the Gulf of Georgia, where it intersected with the north boundary of township No. 38 North, Range 2 East. Simmons' description continued:

> "... thence following the meanderings of the shore in townships No. 37 & 38 North Ranges No. 1 and No. 2 East to the place of beginning [Treaty Rock]."

Exh. F-138. This description contains no bedlands. There is no suggestion in Simmons' letter that he was proposing any change in the boundary of the reservation along Bellingham Bay.

6. C.C. Finkbonner, the then "Farmer-in-Charge" of the Lummi Reservation, submitted his fifth annual report to the Bureau of Indian Affairs in July, 1867. (Exh.F-146). The report states that the reservation is located on Bellingham Bay and is an island sufficiently isolated to prevent the encroachment of white settlers. The report then sets forth a legal description of the boundaries of the reservation, which legal description coincides with the legal description of the boundaries proposed by Simmons in 1859. The report describes the reservation as being eight miles long and two to four miles wide, containing an area of from 15,000 to 20,000 acres of land.

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[1] These changes are not in question in this sub-proceeding.

7. Correspondence received by the Commissioner of Indian Affairs during 1873 (Exhs. F-139, F-140, and F-141) reflects that the official survey, performed in 1860, had incorporated the boundary changes proposed by Agent Simmons. Some of the land excluded by those changes from the original reservation had then been sold to non-Indians. The 1873 correspondence questioned the validity of the boundary changes and the sales to non-Indians.

8. President Ulysses S. Grant issued an Executive Order on November 22, 1873, (Exhs. F-151 and F-155), establishing the Lummi Reservation, defined by the following legal description:

> "Commencing at the eastern mouth of Lummi River thence up said river to the point whence it is intersected by the line between sections seven and eight of township thirty-eight North range two east of the Willamette Meridian thence due North on said Section line to the township line between townships thirty-eight and thirty-nine thence west along such township line to low-water mark on the shore of the Gulf of Georgia thence Southerly and easterly along the said shore with the meanders thereof across the western mouth of Lummi river and around Point Francis thence northeasterly to the place of beginning. -- So much thereof as lies south of the west Fork of the Lummi river being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857 [sic] [Stats at Large Vol 12 p. 928] (s) U.S. Grant."

(Exh. F-151). The punctuation in the foregoing reflects that in Exh. F-151, which is a handwritten copy of the original. Exh. F-155 is a different handwritten copy, and is considerably less legible.[2]

9. The State of Washington was admitted to the United States on November 11, 1889.

10. In *United States v. Romaine, supra,* the Ninth Circuit ruled that, at the time the Treaty was signed, the mouth of the east fork of the Lummi River[3] was a point called "Treaty Rock." The Ninth Circuit held, therefore, that Treaty Rock is the point of beginning for the legal description defining the Lummi Reservation. That decision remains binding upon the parties and upon this court.

11. General Land Office Surveyors placed a brass cap of Treaty Rock in 1930 (Exhs. L-15 and L-17). Although the rock has since been covered with silt, it remains in place. Treaty Rock is above or closer to shore than the low water mark.

12. With one possible exception, no map of the reservation introduced into evidence shows a boundary which includes a straight line from the general area of Point Francis to Treaty Rock. The possible exception is Exhibit L-14, which is a copy of Exhibit 4 in

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[2] Exh. F-151 is a certified copy of the document in the Seattle branch of the National Archives. Exh. F-155 is a certified copy of the document lodged in the National Archives in Washington, D.C.

[3] The east fork of the Lummi River was later called the Nooksack River.

United States v. Romaine. That exhibit shows a dashed line, but without any label. It is unknown who drew the line, or what it was intended to represent.

13. "Point Francis" is not a clearly defined location. The maps of the area are in direct conflict on this point. Exhs. F-151, F-154 and F-155 show it as the easternmost portion of Portage Island. Exh. L-14 and F-165 show it as the southernmost portion. Exhs. F-150, F-147, F-156, and F-164 show it as some location between those two. Exhs. F-148 and F-149 show it as a long sweep along the southern coast of Portage Island. Exh. F-162 shows it as the lower part of the Lummi peninsula, the upper part of Portage Island, and the portage area between. Exh. F-163 shows it as a long sweep along the eastern shore of Portage Island. The description in Exh. F-159, a portion of the "U.S. Coast Pilot" for 1889, equates "Point Francis" with all of Portage Island.

14. The expert surveyor who testified on behalf of the State testified that the legal description in the Executive Order is not really susceptible to two interpretations. It was very clear to him that the eastern boundary followed the low water mark. By contrast, the expert surveyor who testified on behalf of the Lummis could testify only that he would be "hard pressed" to judge which would be the better reading of the description. No surveyor testified that under the proper reading of the description the eastern boundary was a straight line between the Point Francis area and Treaty Rock. The expert surveyor who testified on behalf of the State had prepared more thoroughly, and was more persuasive, than the expert surveyor on behalf of the Lummis.

CONCLUSIONS OF LAW

1. Principles governing treaty construction apply equally to the construction of an executive order based upon a treaty. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257 n.6 (9th Cir. 1983), *cert. denied sub nom. Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 465 U.S. 1049 (1984). It is held in *Washington v. Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979):

> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills, and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be interpreted by the Indians.'
> [citations omitted]

Treaties with Indians and statutes passed for the benefit of Indians are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-631 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78,79 (1918). However, while the rule by which legal ambiguities are resolved to the benefit of the Indians is given the broadest possible scoped, the Supreme Court in *De Coteau v. District County Court*, 420 U.S. 425,447

(1975), cautioned: "[I]t remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." Therefore, the fact that the legal description in the Executive Order is ambigious does not *ipso facto* entitle the Lummis to the most favorable conceivable interpretation when all of the other evidence strongly supports the selection of the low water mark as the eastern boundary.

2. The natural and logical reading of the legal description in the Executive Order leads to the conclusion that the eastern boundary of the reservation follows the low water mark, just as the western boundary does. This conclusion is reinforced by the fact that no map of the reservation ever depicted any portion of Bellingham Bay as within its boundaries with the possible exception of Exh. L-14. It is further supported by the fact that "Point Francis" is not a clearly defined location from which a straight line could be drawn. Finally, it is reinforced by the fact that the legal description prescribes that the boundary proceeds "around" Point Francis, not "to" Point Francis.

3. The description calls for the boundary to proceed northeasterly to Treaty Rock. In light of the entire description, this does not require a boundary that runs in a precise northeasterly direction. Nor does it require a straight line boundary at all. The prior portion of the description calls for the boundary, from its first intersection with the Gulf of Georgia, to follow the shore southerly and easterly around Point Francis. As Exh. F-151 demonstrates, such a line at times runs not only south and east, but also north, northwest, southwest,

northeast, etc. Consistent with the description, however, the Point Francis area is generally southerly and easterly from the intersection with the Gulf of Georgia. Similarly, Treaty Rock is generally northeasterly from the Point Francis area.

4. The description in the Treaty limited the reservation to certain land areas. it does not include any portion of Bellingham Bay. The description in the Treaty is unambiguous in this respect.

5. The legal description in the Executive Order changed somewhat the description in the Treaty. But evidence of the surrounding circumstances establishes that these changes were made to resolve confusion and potential problems as to lands at the northern end of the reservation. By contrast, there is no evidence that the Executive Order was intended to change the eastern boundary in any way, or that there was any impetus for such a change.

6. The parties agree that the legal description in the Executive Order entered in 1873 governs this dispute. The evidence from tribal members as to what Governor Stevens said at Mukilteo in 1854, nineteen years earlier, has little, if any, relevance to the interpretation of that legal description. For several reasons, this evidence would be of only limited value even in determining the boundary established by the Treaty. First, the description in the Treaty, which is the contemporaneous written record, is clear and unambiguous. Secondly, Governor Stevens' words at Mukilteo were translated in two stages before they could be understood by the tribal members present. Third, given the passage of 133 years, almost all of the accounts in this court from tribal members as to the negotiations

are necessarily several times removed from the original witnesses. Finally, the interest of tribal members in exclusive fishing rights in the contested waters must be considered in evaluating their testimony. The Lummis have not established that a boundary at the low water mark deprives them of any rights which they had retained in signing the Treaty.

7. There have been two prior adjudications relating to the boundary of the Lummi reservation. While each case provides some support for one of the parties here, in neither case did the holding address the issue in this case. In *United States v. Romaine, supra,* the Ninth Circuit held that Treaty Rock was the point of beginning. While the court referred to the testimony of tribal members that Governor Stevens had indicated a straight line boundary, 255 Fed. at 256-257, 259-260, this issue was not necessary to the decision and the Ninth Circuit did not resolve it. In *United States v. Stotts,* 49 F.2d 619 (W.D.Wash. 1930), this court held that the reservation included the tidelands. The holding in *Stotts* is consistent with both of the interpretations urged in this sub-proceeding. Insofar as it appears, *Stotts* was not presented with the contention that the eastern boundary is a straight line. *Stotts* did state that the boundary established by the Executive Order followed the low water line from the Gulf of Georgia to the point of beginning at the eastern mouth of the Lummi River. 49 F.2d at 620. But *Stotts* cites *Romaine* for this proposition, and *Romaine* does not so hold, at least as to the eastern boundary. More importantly, the issues in *Stotts* required no choice between a boundary along the low water mark and a straight line eastern boundary.

8. Defining the boundary as the low water mark results in a problem in "closing" the boundary at

the point of beginning, Treaty Rock, which is not along the low water mark. The expert surveyor on behalf of the State proposed that the boundary be closed by a line running due north from the low water mark to Treaty Rock. This solution is a reasonable one, and is fair to the Lummis. It is most clearly illustrated on Exh. L-25.

9. The eastern boundary of the Lummi Indian Reservation is deemed to proceed along the low water mark around Portage Island and, following the meanderings of the shore, to a point due south of Treaty Rock; then due north to Treaty Rock.

ORDER

1. The eastern boundary of the Lummi Indian Reservation is deemed to proceed along the low water mark around Portage Island and, following the meanderings of the shore, to a point due south of Treaty Rock; then due north to Treaty Rock.

2. The fishing rights and the other rights of all parties shall be governed by this ruling effective as of the date of filing of this Decision and Order re Eastern Boundary of Lummi Indian Reservation.

3. This sub-proceeding is remanded to United States Magistrate John L. Weinberg for further proceedings relating to the claims by the State of Washington to equitable adjustment of future catches.

IT IS SO ORDERED.
Dated: May 24, 1990.

ROBERT E. COYLE
United States District Judge

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff,* and LUMMI INDIAN TRIBE, *Intervenor-Appellant,* v. STATE OF WASHINGTON, *Defendant-Appellee.*	No. 90-35887 D.C. No. 9213-Phase I **OPINION**

Appeal from the United States District Court
for the Western District of Washington
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
November 7, 1991 - Seattle, Washington

B - 2

Filed June 30, 1992

Before: Eugene A. Wright, Procter Hug, Jr., and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

GOVERNMENT LAW/NATIVE AMERICANS

Affirming a district court judgment, the court of appeals held that the eastern boundary of the Lummi Reservation in Washington State is the line of low tide on the eastern side of the peninsula containing the Lummi Reservation.

Appellant Lummi Indian Tribe brought an action concerning the allocation of fish resources of the northwest United States between Indians and non-Indians; in this instance, the fish in Bellingham Bay. However, the court could not rule on the proper allocation of fish until it decided whether part of Bellingham Bay was included in the Lummi Indian Reservation. According to the Lummi, their reservation includes the waters of Bellingham west of the line from Point Francis to Treaty Rock under the 1855 Treaty of Point Elliott and the Executive Order of 1873. The district court agreed with Washington State that the eastern boundary of the reservation was the line of low tide on the eastern side of the peninsula containing the Lummi Reservation.

[1] The rule has long been that treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in their favor. **[2]** Here, there was no ambiguity in the 1873 Executive Order describing the eastern boundary of the Lummi Reservation. **[3]** Here, the district court correctly observed that while the Romaine court referred to the testimony of tribal members that Governor Stevens had indicated a straight line boundary, but this issue was no necessary to the decision, and the Ninth Circuit did not resolve it.

COUNSEL

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Phillip E. Katzen, Evergreen Legal Services; Mason D. Morisset, Pirtle, Morisset, Schlosser & Ayer, Seattle, Washington; Annette M. Klapstein, Tacoma, Washington; Alvin Ziontz, Ziontz, Chestnut, et. al, Seattle, Washington; John Sledd, Suquamish, Washington, for additional Indian tribes.

Robert K. Costello and Jay D. Geck, Assistant Attorneys General, Olympia, Washington, for the defendant-appellee.

Ronald Friedman, Assistant United States Attorney, Seattle, Washington; Apphia T. Schley, United States Department of Justice, Washington, DC, for the amicus.

OPINION

LEAVY, Circuit Judge:

FACTS

This interlocutory appeal is about the location of the eastern boundary of the Lummi Indian Reservation in the State of Washington. The State of Washington contends that the eastern boundary of the reservation is the line of low tide on the eastern side of the peninsula that contains the Lummi Reservation. The Lummi Indians contend that the eastern boundary is a straight line from Point Francis to Treaty Rock because that is what Governor Stevens represented to them in 1855 at the Treaty of Point Elliott[1] and because the Executive Order of 1873 is ambiguous. According to the Lummi, the reservation includes the waters of Bellingham Bay west of that line.

This controversy arises in the context of continuing efforts to allocate the fish resources of the northwest United States between Indians and non-Indians; in this instance, the fish in the waters of

---

[1]The Treaty of Point Elliott is part of the Sevens treaties, which established the rights of certain Pacific Northwest Indians to take fish. The treaties were negotiated by Isaac Stevens, the Governor of Washington Territory and Superintendent of Indian Affairs, between the United States and the Indians in the 1850's. *Washington V. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666-60, 674-79 (1979).

Bellingham Bay. The court could not rule on the proper allocation of fish until it decided whether, according to an Executive Order of 1873, part of Bellingham Bay is included in the Lummi Indian Reservation. If so, the Lummi Indians would have an exclusive right to fish within the boundaries of their reservation. *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 683-84 (1978).

After an evidentiary hearing on the issue of the boundary, the magistrate judge made findings and recommendations in favor of the state. The Lummi, other Indian tribes, and the United States objected to the magistrate judge's findings of fact and conclusions of law. After hearing the objections and considering the record, the district court decided in favor of the state. The Lummi Indian Tribe moved for an order certifying the decision for immediate appeal pursuant to 28 U.S.C. §1292(b). The court granted the motion, finding "that the Decision and Order re Eastern Boundary of the Lummi Indian Reservation involves a controlling question of law as to which there is a substantial ground for difference of opinion[.]"

At issue is the interpretation of an executive order of November 22, 1873, by President Grant, which provided a legal description of the boundaries of the Lummi Reservation. The handwritten version of the Executive Order reads:

> Executive Mansion
> November 22 1873
>
> It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for

> the use of occupation of the Dwamish and other allied tribes of Indians, viz.
>
> Commencing at the eastern mouth of the Lummi River thence up said river to the point where it is intersected by the line between sections seven and eight of township thirty eight north range two east of the Willamette meridian thence due north on said section line to the township line between townships thirty eight and thirty nine thence west along said township line to the low-water mark on the shore of the Gulf of Georgia thence southerly and easterly along the said shore and with the meanders thereof across the western mother of Lummi river and around Point Francis thence northeasterly to the place of beginning - so much thereof as lies south of the west Fork of the Lummi river being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians made and concluded January 22, 1857 [*sic*] [Stats at. Large Vol. 12. p. 928]
>
> U.S. Grant.

After reviewing evidence from both parties supporting their differing interpretations of "and around Point Francis thence northeasterly to the place of beginning," which describes the reservation's eastern boundary, the district court decided that the State of Washington was correct: "the eastern boundary of the reservation follows the low water mark, just as the western boundary does."

ANALYSIS

Standard of Review

Treaty interpretation is a mixed question of law and fact. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988). We review de novo the interpretation and application of a treaty. *Dillon v. United States*, 792 F.2d 849, 852 (9th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).[2] Where an executive order relates to a reservation set aside by treaty, the review is also de novo. *Cf. Puyallup Indian Tribe v. Port of*

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[2]The parties cite *United States v. Washington*, 730 F.2d 1314, 1317-18 (9th Cir. 1984) for the standard of review, which they claim is "clearly erroneous." However, that case did not involve the interpretation of a treaty or of an executive order pursuant to a treaty. It dealt instead exclusively with evidence ("historical facts") presented to determine where the Makah Indian Tribes' "usual and accustomed fishing grounds and stations" under the 1855 Stevens treaty were located. At the time the Makah case arose, the 1855 treaty reference to "usual and accustomed grounds and stations" had already been interpreted. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988) (quoting *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) (the Boldt decision)).

Here, in contrast, we must interpret the Executive Order and its phrase "and around Point Francis thence northeasterly to the place of beginning[.]" Thus *United States v. Washington*, 730 F.2d 1314, does not provide the standard of review.

Tacoma, 717 F.2d 1251, 1257 n.6 (1983), *cert. denied*, 465 U.S. 1049 (1984).

We may affirm "on any basis supported by the record even if the district court did not rely on that basis." See *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986) (reviewing a dismissal for failure to state a claim.)

Construction of Indian Treaties and Executive Orders

[1] The rule has long been that "treaties with the Indians must be interpreted as they would have understood them, ... and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Puyallup Indian Tribe*, 717 F.2d at 1257 (quoting *Choctaw*). We have stated that the rule applies to executive orders no less than treaties. *Puyallup Indian Tribe*, 717 F.2d at 1257 n.6: *Moore v. United States*, 157 F.2d 760, 762 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

The District Court's Decision

The district court found that the 1873 Executive Order was ambiguous in describing the eastern boundary of the Lummi Reservation. The court resolved the ambiguity it found in favor of the state:

> [T]he fact that the legal description in the executive Order is ambigious [*sic*] does not ipso facto entitle the Lummis to the most favorable conceivable interpretation when all of the other evidence strongly supports

> the selection of the low water mark as the eastern boundary.

[2] Although the district court's decision was reached after hearing evidence, we find no ambiguity in the Executive Order. In addition to stating "and around Point Francis thence northeasterly to the place of beginning" the Executive Order states immediately thereafter "- so much thereof as lies south of the west Fork of the Lummi river being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians mad and concluded January 22, 1857 [*sic*] [Stats at. Large Vol. 12 p. 928]."

The latter statement in the Executive Order means that the south of the west fork of the Lummi River, the boundaries are to follow those set forth in the treaty. The executive Order makes clear that the line of low water marks the actual boundary. The treaty says nothing about a straight line boundary from Point Francis to Treaty Rock. Instead, Article II of the Treaty of Point Elliott (Muckl-te-oh, or Mukilteo), dated January 22, 1855, 12 Stat. 927 (1859) states in relevant part:

> There is, however, reserved for the present use and occupation of said tribes and bands the following *tracts of land,* viz: ... the *island* called Cha-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia.

United States Statutes at Large 36-37th Congress, 1859-63, Vol. 12, at 928 (emphasis added). The Executive Order specifically incorporates the provision of the Treaty reserving the island and does nothing more than to specify that the boundary around the island "already set apart" shall follow the low water mark. We think this intent is clear from the statement in the Executive Order that the low water mark shall be followed on the shore of the Gulf of Georgia "southerly and easterly along the said shore with the meanders thereof across the western mouth of Lummi river *and* across Point Francis thence northeasterly to the place of beginning." (Emphasis added).

This interpretation comports with the fact that the Executive Order of 1873 was designed to add land to the reservation to the north of the island of Cha-choo-sen. Therefore, the Executive Order describes the land added to the north specifically and in detail. The description mentions Point Francis in order to include the land known as Portage Island, the Executive Order does not need to be specific because by its terms it is merely describing the remainder of the island already designated for the Lummi in the treaty.

The Romaine Decision

In *United States v. Romaine*, 255 F. 253 (9th Cir. 1919), we had to decide the location of "the point of beginning" referred to in the 1873 Executive Order on the eastern boundary of the Lummi Reservation. The dispute in *Romaine* arose when

> The United States brought suit to quiet the title of the Indians of the Lummi Indian reservation to certain lands alleged

> to be within the boundaries of the reservation, but which had been sold to the defendants as tidelands by the state of Washington.

Id. at 253. The court quoted the language of the Treaty of Point Elliott and the 1873 Executive Order, *id.* at 253-54, and said:

> The controversy involves the question of the true location of the mouth of the East fork of the Lummi river, later called the Nooksack. The appellant [the Lummi tribe] contends that the mouth of the river at the time of the treaty was at or near a point marked by a conspicuous rock called by the Indians "Treaty Rock." The appellees [the non-Indian settlers] contend that the mouth of the river was at a point now marked by two cottonwood trees, nearly opposite the old church, about a mile and a half or two miles westerly from Treaty Rock.

Id. at 254.

For two reasons, this court reversed the district court's decision in favor of the appellees, who were the non-Indian purchasers of the tidelands in questions. First, we found that hydrographic maps[3] prepared by the United Sates Coast and Geodetic Survey "should be

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[3]Hydrography is the determination of depths of water. Reporter's Transcript of August 3, 1987 (RT 1), at 26-27.

taken as absolutely establishing the truth of all that they purport to show." *Id.* These maps showed the mouth of the Lummi, or Nooksack River, near the location of Treaty Rock. *Id.* They did not show any river mouth to the west of Treaty Rock.[4]

Second, we accepted the testimony of several Lummi Indians, including one 100-year old, George Tsilano. Tsilano was 38 years old at the time of the 1855 treaty, and he testified, along with other Lummi who were present at the treaty negotiations, that "the eastern boundary line was from Point Francis to [Treaty Rock]." *Id.* at 256.

In concluding that the eastern mouth of the Lummi River had been near Treaty Rock in 1855, we stated:

> It is to be observed that in all the evidence produced by the appellees, no information is furnished as to the location of the mouth of the river at any time prior to the year 1868. The appellants, on the other hand, have produced evidence of its position in the year 1855, the year in which the treaty was made. That evidence, uncontradicted and unimpeached, and sustained as it is by the

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[4]The evidence showed that in 1889, the river cut through its south bank near the cottonwoods and flowed south, instead of east, into Bellingham Bay. *Romaine,* 255 F. at 253. This change accounted for the difference in the location of the eastern mouth of the river, and for the different interpretations of the Executive Order.

> hydrographic maps which the court below, erroneously as we think discredited, together with the *proof of the general understanding of the Indians that the treaty fixed the eastern line of their reservation on a line running from Point Francis to Treaty Rock,* is sufficient to sustain the contention of the appellant that the eastern mouth of the river was in 1855 at or near Treaty Rock.

Id. at 259 (emphasis added).

The appellees in *Romaine* had also argued that a reservation to Indians of land on tidewater in Washington Territory was presumed to extend only to the high-water mark. *Id.* We responded:

> The intention to reserve to the Indians the possession of the land to low-water mark is made evident by the terms of the [1873 Executive Order], for one of the courses on the west side of the island runs "to the low-water mark on the shore of the Gulf of Georgia, then southerly and easterly along the said shore with the meanders thereof, across the western mouth of Lummi river, and around Point Francis.' The next course is 'thence northeasterly to the place of beginning.' *There was no occasion to mention low-water mark on the east side of the island, for if, as we have found, the place of beginning was in fact at Treaty Rock, the last line of the description includes within the boundaries all the land here in controversy.*

Id. at 259-60 (emphasis added).

[3] *Romaine*, however, is not precedent for this case, because the issues there were the ownership of tidelands on a portion of the eastern boundary and where the place of beginning referred to in the Executive Order was in 1855, not the location of the entire eastern boundary. Consequently, *Romaine* does not discuss what the incorporation of the second article of the treaty meant in the Executive Order because there was no need to resolve that issue. The district court correctly observed that "While the [*Romaine*] court referred to the testimony of tribal members that Governor Stevens had indicated a straight line boundary, 255 F. at 256-257, 259-260, *this issue was not necessary to the decision* and the Ninth Circuit did not resolve it." (Emphasis added.) Until today, we have not resolved the question of the entire eastern boundary from Point Francis to Treaty Rock.

Although we do so on other grounds, the decision of the district court is **AFFIRMED**.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, and LUMMI INDIAN TRIBE, Intervenor/ Appellant, v. STATE OF WASHINGTON, Defendant/ Appellee.	No. 90-35887 ORDER

Before: WRIGHT, HUG, and LEAVY, Circuit Judges.

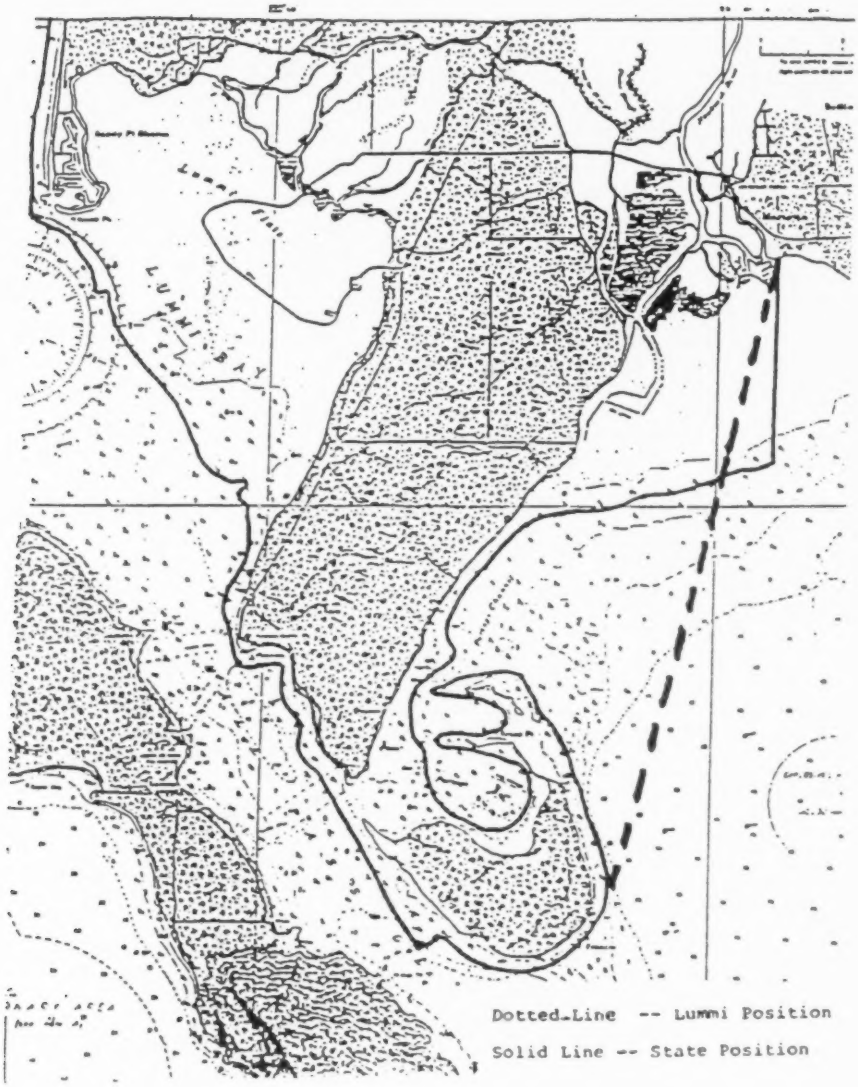
The panel has voted to deny the petition for rehearing.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The en banc request failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

RESERVATION MAP



No. 92-1445

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA
Plaintiff,

LUMMI INDIAN TRIBE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petition for Writ of Certiorari should be denied. However, if granted, this case presents an additional question: Does the decision in Montana v. United States, 450 U.S. 544 (1981) and the Equal Footing Doctrine presumption against inclusion of navigable waters in a pre-statehood reservation mean that Bellingham Bay is not included within the boundaries of the Lummi Indian Reservation?

TABLE OF CONTENTS

Page

I. OPINIONS BELOW 1

II. NOTICE OF MISSTATEMENT REQUIRED BY RULE 15.1 2

III. STATEMENT OF THE CASE 3

IV. REASONS WHY THE PETITION SHOULD BE DENIED 10

1. The Opinion Below Does Not Conflict With Rules of Interpretation for Indian Treaties or Executive Orders. 11

2. This Case Does Not Present the Issues Described in the Lummi Petition. 13

3. The Court of Appeals' Decision Does Not Conflict With *Alaska Pacific Fisheries*. 17

4. The Court of Appeals' Opinion may be Affirmed Based on the Equal Footing Doctrine. 19

V. CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Page

Alaska-Pacific Fisheries v. United States
248 U.S. 78 (1918) 17, 19

Icicle Seafoods, Inc. v. Worthington
475 U.S. 709 (1986) 14

Martin v. Waddell
41 U.S. (16 Pet.) 367 (1842) 19, 20

Montana v. United States
450 U.S. 544 (1981) 20

Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe
473 U.S. 753 (1985) 11, 12, 22

Quinault Allotee Ass'n. v. United States
485 F.2d 1391 (1973) 17

United States v. Aam
887 F.2d 190 (9th Cir. 1989) 20

United States v. Holt State Bank
270 U.S. 49 (1926) 20

United States v. Romaine
255 F. 253 (9th Cir. 1919) 9, 10, 15

United States v. Washington
774 F.2d 1470 (9th Cir. 1985) 3

Utah Div. of State Lands v. United States
482 U.S. 193 (1987) 20

Washington v. Yakima Indian Nation
439 U.S. 463 (1979) 21

Other Authorities

Cohen's Handbook of Federal Indian Law (1982) 16

No. 92 - 1445

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA
Plaintiff,

LUMMI INDIAN TRIBE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT, STATE OF WASHINGTON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B14) is reported at 969 F.2d 752. The opinion of the district court with findings of fact and conclusions of law (Pet. App. A1-A12) is not reported.

II. NOTICE OF MISSTATEMENT REQUIRED BY RULE 15.1

Rule 15.1 requires the respondent to address any "perceived misstatements of fact or law set forth in a petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Here, the petition contains significant misstatements of historic facts. (See Statement of the Case at 7-9.)

Petitioner's question asks whether the court of appeals erred in "failing to consider the historical context and the clear Indian intent and understanding of a Treaty promise when interpreting" the 1873 Executive Order at issue in this case. The district court, however, rejected many of Lummi's factual assertions and made findings of fact showing that the historic context

supports the State of Washington's interpretation.

The factual misstatements show that the Question stated by Petitioner would not be properly before the Court if certiorari were granted. See part IV. B. below. Essentially, the Question presented by Petitioner invites this Court to retry this case and ignore findings of the district court.

III. STATEMENT OF THE CASE

This case arose after Petitioner excluded non-Indians from fishing in certain waters of Bellingham Bay. To determine whether the Tribe owed non-Indians an equitable adjustment for imbalance of fish harvests, the trial court first determined whether the area of Bellingham Bay was within the Lummi Indian Reservation. See generally United States v. Washington, 774 F.2d

1470 (9th Cir. 1985) (describing equitable adjustment).

The Lummi Reservation was created pursuant to the Treaty of Point Elliott, executed January 22, 1855. Article 2 of the Treaty set aside

> "the island called Chah-choo-sen, situated in the Lummi River at the point of separation at the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia."

Pet. App. A2-A3 (Finding No. 2).

An 1859 map of all Indian reservations in the territory showed the Lummi Reservation as the island, without including any portion of the Bay. Pet. App. A3 (Finding No. 4). Over the years, numerous other maps were made by the United States and no map ever depicted the reservation boundary as a straight line across the Bay. Pet. App. A6, A9 (Finding No. 12, Conclusion No.

2). Other evidence in the record showed a United States and Indian understanding that the boundary was the shoreline.

Indian agent Michael Simmons, who had attended the treaty council, described the boundary in 1859 as the shoreline, not a straight line across the Bay. Pet. App. A3-A4 (Finding No. 5). To avoid the costs of survey of the river boundary on the north[1] side of the island, Michael Simmons proposed changing the north boundary to follow township lines (which were cheaper to survey). Pet. App. A3-A5 (Finding Nos. 5 and 7). In 1873, the Commissioner of Indian Affairs questioned the legality of Simmons' changes to the north

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[1] The boundary at issue is on the southeast side of the island.

boundary. Ibid. To eliminate clouds on title to lands included and excluded per Simmons' 1859 proposal, President Ulysses S. Grant issued an Executive Order that formally reserved the "squared off" north boundary. Pet. App. A10 (Conclusion No. 5). There was no evidence of an Indian impetus for the 1873 Order. Ibid.

The 1873 Executive Order expressly described the area of the 1859 survey changes to the north boundary, and then followed the shoreline of the island with the following language:

> . . . thence west along such township line to low-water mark on the shore of the Gulf of Georgia thence Southerly and easterly along the said shore with the meanders thereof across the western mouth of Lummi river and around Point Francis thence northeasterly to the place of beginning [the eastern mouth of Lummi River].

When presented to a surveyor, the 1873 Order was susceptible to only one interpretation -- the boundary followed the shoreline on the western boundary, around Point Francis, and along the disputed eastern boundary. Pet. App. A7 (Finding No. 14). In light of the fact that "Point Francis" referred to an area to go "around," Pet. App. A13 (Finding No. 13), the 1873 Order could not be interpreted as a straight line bearing "northeast" from Point Francis. Pet. App. A9 (Conclusion No. 2).

The historic context described in the Lummi Petition for Writ of Certiorari was not found by the district court. The Lummi allegations about historic facts are inaccurate in the following details:

1. Lummi asserts that in 1854 Governor Isaac Stevens represented that

the Lummi reservation boundary would be a "straight" line from the area of Point Francis to Treaty Rock. Although Lummi made this contention in the pretrial order, the district court did not make such a finding. The trial court entered findings which reject Lummi evidence on this subject. See Pet. App. A10-A11 ("[T]he interest of tribal members in exclusive fishing rights in the contested waters must be considered in evaluating their testimony.") Moreover, other findings of historic fact conflict with Lummi's assertion that Stevens represented a straight line boundary. Pet. App. A2-A7 (Findings 2, 4, 5, 6, 7, 13, and 14).

2. Contrary to statements in the Lummi argument, the district court did not find that "for 138 years the Lummi treated the eastern boundary as a

straight line between Point Francis and Treaty Rock." The record includes substantial evidence that Lummi tribal members understood the reservation boundary to be the shoreline of the island. ER 79-88; SER 44; SER 76-78. Other findings conflict with Lummi's asserted understanding. Finding No. 5 and 6 (Pet. App. A3-A4). [2]

3. Lummi arguments imply that the case of United States v. Romaine, 255 F. 253 (9th Cir. 1919) found that Governor Stevens promised a "straight line" reservation boundary. There was

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[2] Findings Nos. 5 and 6 concern Michael Simmons and C.C. Finkbonner. Simmons negotiated with the Lummi and Finkbonner spoke the Lummi language. Despite their contact with the tribe at treaty time, these two show that the Indians believed the reservation boundary to be the shoreline of the island. SER 44; ER 79-88.

no such finding in Romaine at either the trial court or ninth circuit court of appeals. Instead, the Romaine opinion addresses uncontested Indian testimony about the original location of the eastern mouth of the Lummi river (which is the "place of beginning" for the 1873 Order). 969 F.2d at 757. Romaine did not involve a legal or factual dispute about a straight line or shoreline boundary between the Point Francis area and the eastern mouth of the Lummi River.

IV. REASONS WHY THE PETITION SHOULD BE DENIED

The Question presented by the Lummi Petition is unique and limited to the particular language of the Treaty and 1873 Executive Order. The particular language and historic context of this case does not implicate the

jurisprudence of the Court and therefore does not merit review. Moreover, to reach the Lummi issues, this Court would have to retry the case.

1. **The Opinion Below Does Not Conflict With Rules of Interpretation for Indian Treaties or Executive Orders.**

The ninth circuit court of appeals correctly decided that neither the Treaty nor the Executive Order could be interpreted as reserving a straight line boundary across Bellingham Bay. The court of appeals decision is not new precedent for interpretation of Executive Orders because the law has never allowed courts to disregard plain language. See Oregon Dep't. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985).

Review of the court of appeals opinion presents only the narrow issue

of whether the particular 1873 Executive Order language unambiguously precludes the straight line boundary claimed by Lummi. Without an ambiguity susceptible to a straight line interpretation, the opinion below is not in conflict with canons of construction for Indian law. No rule of interpretation requires a court to accept any interpretation by a modern tribe, when a fair reading of the Executive Order and Treaty reveals no ambiguity. Klamath, 473 U.S. at 774.

Since there is no ambiguity in the language in question, the court of appeals did not depart from the usual course of judicial proceedings with regard to canons of construction for Indian treaties or executive orders. Furthermore, whether or not the particular language was ambiguous does not merit certiorari.

2. **This Case Does Not Present the Issues Described in the Lummi Petition.**

To reach the historical context and Lummi allegations of Indian understanding, the Court would have to go beyond the unambiguous language of this Executive Order and examine the district court's findings of historic fact. See Pet. App. A1-A7.

Lummi, however, ignores the findings of historical fact made by the trial court and reargues its evidence of historic facts. As described in the Statement of the Case at 7-9, the trial court findings do not show a "clear Indian intent and understanding" nor a "historical context" supporting a straight line boundary.

This Court has previously ruled that appellate courts should not insert new findings of fact that conflict with

a trial court's findings. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986). Therefore, even if the Court looks behind the language of the 1873 Executive Order, it will not find the case described by Lummi. Instead, the question would be whether the trial court should be affirmed based on its numerous findings of historical fact confirming that the shoreline is the boundary of the island reservation.

Therefore, the Court should deny the Petition for Writ of Certiorari because this case does not present the issue described by Lummi. The court of appeals opinion does not conflict with "clear Indian understanding" because Lummi never proved that such clear

Indian understanding of a straight line existed.[3]

Similarly, the trial court's findings of fact contradict Lummi's allegation that in 1854 Governor Isaac Stevens represented that the reservation would have a straight line boundary

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[3] Lummi's reliance on excerpts from the appellate record in United States v. Romaine vastly overstates the relevance and credibility of the evidence from that case. The Romaine documents were inconsistent, vague, and uncredible evidence of Lummi's interpretation that the trial court did not accept. See Conclusion No. 6 (Pet. App. A10-A11).

The evidence was not a transcript of Indian testimony; Lummi relies on a lawyer's summary of a translator's description of witnesses such as "George Tsilano." It was not clear whether Tsilano testified about a "straight" line from Point Francis to mouth of the river near Treaty Rock. The trial court also heard evidence that Romaine witnesses, including Tsilano, were completely inaccurate in their contemporaneous descriptions of the other reservation boundaries.

crossing Bellingham Bay. See Statement of the Case at 7-8, above.

Nor is there any finding that the 1873 Executive Order language regarding the reservation's eastern shoreline was based in any way on the treaty negotiation of 19 years before. Pet. App. A10 (Conclusion No. 5). Therefore, the Lummi evidence about the 1855 Treaty negotiations had very little relevance to interpretation of the unilateral 1873 Executive Order.[4]

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[4] Indian understanding is important to interpretation of negotiated agreements or treaties, but not unilateral actions. Cohen's Handbook of Federal Indian Law, 224 n.60 (1982) ("The rule [about Indian understanding] would logically apply to agreements, which like treaties, are bilateral agreements, but would not seem to apply to the executive orders and statutes, neither of which directly involved negotiations with the tribes."); (Footnote continues on next page)

The particular findings of the district court in this case do not merit certiorari.

3. **The Court of Appeals' Decision Does Not Conflict With *Alaska Pacific Fisheries*.**

Lummi's reliance on the case of Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) is misplaced. In Alaska Pacific Fisheries, this Court interpreted an Act of Congress reserving the "body of lands known as Annette Islands [plural]" for use by the Metlakatla Indians. The issue was whether Congress had reserved the waters

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(Footnote continued from previous page)

Quinault Allottee Ass'n v. United States, 485 F.2d 1391, 1400 n. 14 (Ct. Cl. 1973) cert. denied 416 U.S. 961 (1973).

between the islands, or whether the waters were available for fishing by the Alaska Pacific Fisheries Company. The words "body of lands known as Annette Islands" could mean either land, or both land and water.

In contrast, the Treaty with Lummi Indians reserved the "following tracts of land, viz: . . . the island [singular] known as Chah-choo-sen." When there is one island, there is no ambiguity about intervening waters. The words "island known as Chah-choo-sen" are not susceptible to interpretation as a straight line boundary crossing Bellingham Bay.

The court of appeals correctly concluded that the words of the Executive Order with a reference to "island" already set aside by treaty are not susceptible to the ambiguity argued

by Lummi. 969 F.2d at 756. There is no conflict with the unique case of Alaska Pacific Fisheries.

4. **The Court of Appeals' Opinion may be Affirmed Based on the Equal Footing Doctrine.**

In the seminal decision of Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), this Court explained that the several states are presumed to have title to the beds of navigable waters as an attribute of their sovereignty. The "Equal Footing Doctrine" presumes against the conveyance of navigable waters by the prior sovereign. Grants of lands along and under navigable waters are to be construed strictly "and it will not be presumed that (the prior sovereign) intended to part with any portion of the public domain, unless clear and especial words are used to

denote it." Id. at 411 (emphasis added).

This Court has continually upheld the strong presumption against pre-statehood conveyance of navigable waters, even when interpreting pre-statehood reservations for Indian purposes. See, United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Montana v. United States, 450 U.S. 544, 552 (1981); cf. Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) (pre-statehood reservation by United States).

Neither the 1873 Executive Order nor the 1855 Treaty contains any clear and especial words reserving the disputed part of Bellingham Bay for exclusive control and ownership by the Lummi Tribe. Cf. United States v. Aam, 887 F.2d 190 (9th Cir. 1989) (where the

same treaty article did not reserve tidelands adjacent to Suquamish reservation). If certiorari were granted, this case would present the question of whether the 1873 Executive order and 1855 Treaty by implication defeated the equal footing title of the future State of Washington to a substantial portion of Bellingham Bay.

As appellee, Washington is free to defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the district court or court of appeals. E.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Washington argued to each court below that this case could be resolved based on the Equal Footing Doctrine. If certiorari were granted, the Equal Footing Doctrine would be an

alternative basis for affirmance of the district court and court of appeals.

V. CONCLUSION

Canons of construction do not require courts to "ignore plain language that, viewed in historical context and given fair appraisal . . . clearly runs counter to a tribe's later claims." Klamath, 473 U.S. at 774. The court of appeals did not err in its interpretation of the 1873 Executive Order.

When the trial court's findings of historic fact are examined, this case does not present the question described in the Lummi Petition. The Lummi Petition errs by ignoring the prior trial in this case and petitioning for certiorari based on a reargument of the evidence.

The Petition for Writ of Certiorari should be denied for the above reasons.

Respectfully submitted,

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